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Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize

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by S. James Anaya**

I. INTRODUCTION

¶1 In the last several years, the government of Belize, through its Ministry of Natural Resources, has granted at least seventeen concessions for logging on lands totaling approximately 480,000 acres in the Toledo District, its most southern political subdivision. The rural parts of the Toledo District that are affected by the concessions are inhabited primarily by Maya people, descendants of the Maya civilization that flourished throughout substantial parts of Mexico and Central America hundreds of years prior to European colonization in the Western Hemisphere. On November 29, 1996, Maya organizations initiated in the Supreme Court of Belize, the trial court of general jurisdiction, an action challenging the granting of the logging concessions. In the lawsuit, the Maya assert rights over lands and resources that are included in the concessions and seek to have the concessions enjoined and declared in violation of Maya rights.[1]

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1. Belize is a relatively young country that gained its independence from Great Britain in 1981. It has a small, predominantly English-speaking population of about 200,000, of which approximately 10,000 are Maya. The non-Maya population is comprised of a variety of groups marked by diverse ethnic characteristics that reflect complex immigration and settlement patterns dating back to at least the early period of British rule in the nineteenth century. Although it has become a retirement destination for an increasing number of North Americans and Europeans, Belize shares many of the economic and social difficulties of its Central American and Caribbean neighbors. Unlike many other less developed countries, however, Belize has a well structured system of conservation programs that has earned it a reputation as an environmentally friendly place where natural wonders abound. Tourists from around the world are attracted to Belize's barrier reef—the second largest in the world and one of the healthiest coral habitats anywhere—and to inland resorts that provide access to lush tropical forests and animal sanctuaries. For a description of Belize and its tourist

¶2 The applicants in the litigation include the two major representative organizations of the Maya in the Toledo District, the Toledo Maya Cultural Council (TMCC), and the Toledo Alcaldes Association, the latter being comprised of the *alcaldes*, or principal authority figures, of each of the Maya villages in Toledo. The named respondents are the Attorney General of Belize, as the representative of the government, and the Minister of Natural Resources, as the government official primarily responsible for granting the concessions. In their initial pleading in the case, *TMCC v. Attorney General of Belize*,[2] the Maya parties highlight the largest of the seventeen concessions, covering over 24,000 acres of pristine tropical forest, granted to the Malaysian conglomerate that operates in Belize as Atlantic Industries Ltd. The largest of the concessions being challenged by the Maya was issued to another, apparently related Malaysian company, Toledo Atlantic International Ltd., for logging on over 159,000 acres.[3]

¶3 While the environmental threat presented by the logging concessions has raised concerns among urban elites in Belize and elsewhere, the Maya people of Toledo District are the ones most affected by them. The Maya of Toledo live in over thirty villages throughout the District, all of which are either within, or in close proximity to, the lands over which logging concessions have been granted. Lands around the villages that are used by the Maya for agricultural and other subsistence purposes, including hunting and gathering, are included in concession areas.[4]

¶4 From the standpoint of the Maya, the issue is not simply one of environmental degradation; it is more fundamentally one of ownership and control over the lands and resources at stake. The logging concessions represent a model of development that succumbs to the profit-motivated interests of forces from outside the target locality that are eager to see the remaining natural resources of less developed countries converted into financial bounty. This model can be witnessed throughout parts of Central and South America, particularly in areas inhabited by indigenous peoples, where much of the world's remaining commercially viable stands of tropical timber exist. Governments claim for themselves the prerogative of

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industry, see http://www.turq.com/belize.html.
Most of the environmentally protected areas that draw substantial earnings from tourism, however, are in the northern part of the country, well insulated by distance from the roar of bulldozers and the whir of chainsaws that are felling down trees in the southern Toledo District. Environmentalists and forestry experts have identified the logging in Toledo as a major threat to the ecology of the area, which includes a broad diversity of plant and wildlife species. *See* John D. Ivanko, *On the Chopping Block; Logging in Belize*, Earth Action Network, Nov. 21, 1997, *available in* LEXIS, Nexis Library. Particular concern has been raised about siltation of the streams that feed into lagoons and sea waters surrounding the delicate reef at its southern extension. The problem, according to close observers of the situation, is not that forestry is inherently bad, but that the government of Belize is unwilling or unable to enforce elementary principles of sustainable forestry that would minimize environmental impacts and avert substantial long term or permanent damage.

2. TMCC v. Attorney Gen. of Belize, No. 510 [1996] (Belize).

3. *See* Notice of Motion for Constitutional Redress at 2, *TMCC* (No. 510).

4. For a discussion of Maya land use patterns in relation to the logging concessions, see *infra* notes 134-154 and accompanying text.

disposing of natural resources, and they exercise this claimed prerogative in favor of commercial enterprises with, at best, secondary consideration of the legitimate interests of the people who may be affected by the resource development projects.[5] In their suit against the government, the Maya are directly challenging this model by asserting property rights over lands and forest resources that the government of Belize has encumbered and, by attempting to alter the government's course of conduct, to accommodate those rights.

¶5 The Maya are asserting land and resource rights on the basis of historical occupancy and ongoing customary land tenure. Early in this century, the British colonial administration established "reservations" for the benefit of several of the Maya villages within lands considered to be "Crown lands." These reservations, now on presumed national lands, continue to exist and include roughly half the Maya villages. In any event, the customary land tenure patterns of even those villages that were granted reservations extend well beyond the reservation boundaries.[6]

¶6 The Maya parties assert rights over the aggregate territory of their customary land tenure *independently* of any government grant or specific act of recognition. Their Notice of Motion for Constitutional Redress seeks a declaration that the Maya people "hold rights to occupy, hunt, fish and otherwise use" specified lands "and that such rights of use and occupancy . . . , in accordance with the common law and relevant international law, arise from and are commensurate with the customary land tenure patterns of the Toledo Maya."[7] This pleading, moreover, seeks to establish these rights as protected by Articles 3 and 17 of the Belize Constitution which uphold property rights in general terms.

¶7 The remainder of this Article examines the Maya assertion of land and resource rights under the common law and international law, and argues that it has merit. As a former British colony, Belize is a common law jurisdiction, hence the reliance on the common law in the pleading by the Maya parties. The overarching frame of reference for the legal analysis in this Article, accordingly, is the common law as it exists or should be understood to exist in Belize in relation to the claimed "aboriginal rights" to lands and resources. The assessment of the relevant law relies

5. For a discussion of issues of sovereignty over natural resources, see NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997).

6. The Maya parties appended two maps to their initial pleadings. The first map shows the logging concessions in relation to Maya villages and lands. The second map illustrates the aggregate territory that the Maya traditionally have used and occupied throughout the present time in southern Belize. In 1997, the TMCC and the Toledo Alcaldes Association published this map in a 150 page "Maya Atlas." *See* THE MAYA PEOPLE OF SOUTHERN BELIZE, TOLEDO MAYA CULTURAL COUNCIL & TOLEDO ALCALDES ASSOCIATION, MAYA ATLAS: THE STRUGGLE TO PRESERVE MAYA LAND IN SOUTHERN BELIZE 18 (1997) [hereinafter MAYA ATLAS]. This Atlas also includes a detailed narrative of Maya history and culture. It graphically illustrates, in hand-drawn color maps, the customary land tenure of each of the Maya villages of southern Belize. Maya researchers produced the Atlas with the assistance of professional geographers associated with the University of California at Berkeley, including Professor Bernard Nietschmann.

7. *See* Notice of Motion for Constitutional Redress at 1-2, *TMCC* (No. 510).

substantially on the jurisprudence of other common law jurisdictions, particularly Australia, Canada, and the United States, in which doctrine has developed specifically to recognize such aboriginal rights—that is, rights of indigenous peoples on the basis of their historical occupancy or use of lands. This approach is consistent with the practice of the courts in Belize, which is to look to precedents of other common law countries especially in the absence of controlling local judicial authority.[8] The transnational dimensions of the common law as developed in Belize are enhanced by the structure of the appeals process. Appeals from the Belize Supreme Court in constitutional and other matters may ultimately be heard by the Judicial Committee of the British Privy Council, which also continues to review judicial decisions from other countries within the British commonwealth.[9]

¶8 The legal analysis in this Article also includes reference to developing international human rights norms that uphold indigenous peoples' rights to lands and resources. On the international plane, international law binds Belize and its public officials independently of the common law that is generated through domestic adjudicative processes (although such processes have transnational dimensions). For the purposes of the Maya litigation in the domestic forum, international law has bearing primarily as an interpretive guide to an understanding of the relevant common law.

¶9 Part II of the Article assesses the relevant legal principles, particularly in relation to the common law rubric of aboriginal rights, and then applies these principles to the situation of the Maya in light of the documentary evidence submitted to the court in *TMCC v. Attorney General of Belize*. After their initial pleading, the Maya parties submitted detailed affidavits, expert reports, and additional maps which together give a detailed account of the historical and contemporary land and resource use patterns of the Toledo Maya. This account has gone largely unrefuted by the government in its own submissions to the court. The government submissions include affidavits and related documents that instead emphasize historical acts of conquest by the Spanish and later acts of land administration by the British and the post-colonial governments. Government affidavits also attempt to portray the contemporary Maya of Toledo as unrelated to the Maya who inhabited the territory prior to this century, but Maya experts authoritatively rebut this portrayal of Maya

8. *See, e.g.*, San Jose Farmers' Coop. Soc'y Ltd. v. Attorney-General, 43 W.I.R. 63, 77 (Belize C.A. 1991) (citing a decision that upheld a Canadian case applying the doctrine of severance law); Caribe Farm Indus. v. British Am. Cattle Co., 49 W.I.R. 39, 46-47, 49 (Belize C.A. 1995) (considering Australian and New Zealand title cases in land registration case). *See generally* VELMA NEWTON, COMMONWEALTH CARIBBEAN LEGAL SYSTEMS: A STUDY OF SMALL JURISDICTIONS 52-53 (1988) (noting that Caribbean judges have treated other Commonwealth and American court decisions as persuasive authorities); A.D. Burgess, *Judicial Precedent in the West Indies*, 7 ANGLO-AM. L. REV. 113, 130 (1978) (noting that English cases, while not binding, are of high persuasive authority in the West Indies).

9. *See* Peter Jackson, *Appeals to the Judicial Committee of the Privy Council: Problems and Prospects*, *in* INTERNATIONAL HUMAN RIGHTS IN THE COMMONWEALTH CARIBBEAN 17 (A. Byre & B. Byfield eds., 1991).

ethnography. Part II concludes that the evidence manifests a history and continuity of Maya land tenure that is sufficient to support a *prima facie* case for aboriginal rights over lands and resources in Toledo.

¶10 Having established *prima facie* the existence of Maya aboriginal rights on the basis of historical and continuing land tenure, the Article in Part III analyzes events described or alluded to in the government affidavits to determine the extent to which such events might be deemed to have legally extinguished or diminished Maya rights. This Part concludes that the government of Belize has not met its burden, under the discernible legal standards, of showing historical or contemporary events that would suffice to extinguish Maya aboriginal rights over the lands and resources concerned. Historical assertions of authority and power by the Spanish and the more recent acts of colonization and land administration by the British did not extinguish Maya rights, at least with respect to those lands and resources that have continued under Maya use and occupancy.

¶11 Whereas Parts II and III argue for the *existence* of Maya aboriginal rights to lands and resources within the logging concession areas, Part IV analyzes and describes the *character and scope* of these rights. Under the common law and international norms, the character of Maya aboriginal rights are a function of Maya customs and land use patterns. The evidence of these customs and patterns indicates that the Maya hold exclusive ownership rights over certain areas which include the villages and surrounding lands; additionally, the Maya have nonexclusive rights to engage in multiple subsistence and cultural activities over lands that are farther removed from the village centers. These aboriginal rights extend over substantial parts of the logging concession areas, beyond the boundaries of the rudimentary reservations that were created for the Maya by the British earlier in this century.

¶12 This Article does not take on the complex task of assessing the full extent and character of the protections that attach to these common law property rights under the laws and Constitution of Belize other than to argue that such constitutional protections do indeed attach. Whatever the level of legal protection, the Belize government simply cannot ignore these rights. It rather should come to terms with the Maya and make appropriate accommodations.

II. MAYA RIGHTS TO LANDS AND RESOURCES UNDER THE COMMON LAW APPLICABLE IN BELIZE

A. Longstanding Occupancy or Use as Capable of Generating Property Rights

¶13 Throughout common law jurisdictions such as Belize, legally enforceable rights may exist on the basis of occupancy or use of lands that has been sustained over a substantial period of time, notwithstanding the

absence of any prior affirmative grant of rights by the executive or legislative authority of the governing sovereign.[10] In various contexts, the common law has incorporated local custom to define real property rights.[11] The operative principle here values settled expectations arising from human inhabitation and productive or beneficial use of lands or resources that have continued beyond brief or sporadic episodes.[12]

¶14 This principle was controlling in *Attorney-General for British Honduras v. Bristowe*,[13] a decision by the Privy Council in a case concerning a dispute over an area of land in what is today Belize. The Privy Council in *Bristowe* held that settlers had established property rights against the Crown on the basis of occupancy and use of the land over a period in excess of sixty years.[14] At the time the case was decided, the *Nellum Tempus Act*[15] barred any assertion of title by the Crown over land that effectively had been possessed over a period of sixty years.[16] Subsequent legislation in force during this century reduced the period for establishing legal estates in land by adverse possession to thirty years against the Crown and twelve years against private subjects.[17]

¶15 By the same philosophy through which settlers that have occupied land over a certain period of time obtain property rights, common law property rights also exist in favor of indigenous or aboriginal peoples—like the Maya—on the basis of their long-standing occupancy and use of ancestral lands. It appears undisputed that, during this century alone, Maya people have continuously occupied and used specific lands—including lands within the areas of the logging concessions—for periods far in excess of the ordinarily applicable period for establishing property rights against the Crown or private subjects on the basis of adverse possession.[18]

¶16 That is not to say that the Maya must rely on the law of adverse possession in order to establish land and resource rights apart from a government grant. The Maya people who now occupy the Toledo District are not mere settlers nor adverse possessors of land; rather—as historical and anthropological data show—they are people indigenous to the region whose inhabitation of the Toledo District has deep historical and cultural roots, a fact that broadens and enhances the legal basis of Maya property

10. *See* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 8 (William S. Hein & Co., Inc. 1992) (1766).

11. *See* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 179-91 (1989) (discussing similar application of common law in Gold Coast (now part of Ghana), Sierra Leone, Pitcairn Island, British New Guinea (now part of Papua New Guinea), and Ocean Island); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 20-21, 138-39 (2d ed. 1986) (providing examples in the English common law).

12. *See generally* BLACKSTONE, *supra* note 10, at 8 (discussing legal rights arising from long-term occupancy).

13. 6 App. Cas. 143 (P.C. 1880) (appeal taken from British Honduras).

14. *See id.* at 155.

15. 1861, 9 Geo. 3, c. 16, *as amended by* 24 & 25 Vict. c. 62 (Eng.).

16. *See id.*

17. *See* Limitations Act, 1939, 2 & 3 Geo. 6, ch. 21, § I (Eng.).

18. *See infra* notes 89-103 and accompanying text.

rights. As indigenous peoples, the Maya of Toledo appropriately may look to the common law doctrine of aboriginal rights.

B. The Doctrine of Aboriginal Rights

¶17 Courts in common law countries that have developed from colonial settlement patterns, including Australia, Canada, and the United States, have recognized and developed a body of doctrine that specifically upholds "original" or "aboriginal" rights of the indigenous or native peoples. While judicial interpretations of this body of doctrine vary somewhat across jurisdictional boundaries, the doctrine in principle, like others of the common law, is shared among diverse jurisdictions. Within this body of common law doctrine, aboriginal rights to lands exist by virtue of historical patterns of use or occupancy and may rise to the level of a legal entitlement in the nature of exclusive ownership, referred to as "native" or "aboriginal title."[19] Apart from such native or aboriginal title in its fullest sense, aboriginal rights may take the form of free-standing rights to fish, hunt, gather, or otherwise use resources or have access to lands.[20]

¶18 Aboriginal rights in lands and resources are *sui generis*, given their basis in a particular set of circumstances characteristic of aboriginal peoples and their traditional, culturally specific connections with lands and resources.[21] In general, courts have considered aboriginal rights to be held collectively by the aboriginal groups within which they arise, while the nature and distribution of the rights among such groups, subgroups, and individuals are a function of the relevant aboriginal customs.[22] Further, because of their origins outside of the dominant legal systems imported by settler societies, aboriginal rights generally are held to be inalienable, except to the sovereign that asserts authority over the corresponding territory.[23]

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19. United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116-18 (1937); Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 69 (Austl.); R. v. Van der Peet [1996] 137 D.L.R. (4th) 289, 309 (Can.); Amodu Tijani v. Secretary, S. Provinces, 3 N.L.R. 21, 52 (P.C. 1921) (appeal taken from Nig.). *See generally* MCNEIL, *supra* note 11, at 276-97 (discussing Australian Aboriginal, Canadian Indian, and Inuit titles to land); Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947) (exploring aboriginal titles in the United States); Brian Slattery, *Understanding Aboriginal Rights*, 66 Can. Bar Rev. 727 (1987) (outlining a general theory of aboriginal rights in Canada).

20. *See, e.g.*, Antoine v. Washington, 420 U.S. 194 (1975) (upholding off-reservation right to hunt and fish); R. v. Adams [1996] 110 C.C.C. (3d) 97 (Can.) (holding that the Mohawks of St. Regis Reserve have the right to fish in waters that are not located within the reserve); *see also Amodu Tijani*, 3 N.L.R. 21 (holding that native rights of a tribe include usufructuary occupation or right).

21. *See Mabo [No. 2]*, 175 C.L.R. at 7; Canadian Pac. Ry. Ltd. v. Paul [1988] 2 S.C.R. 654, 678 (Can.); Hamlet of Baker Lake v. Minister of Indian Affairs [1987] 107 D.L.R. (3d) 513, 545 (Can.); Guerin v. The Queen [1984] 2 S.C.R. 335, 379 (Can.); *Amodu Tijani*, 3 N.L.R. at 53-54.

22. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835); R. v. Cote [1996] 138 D.L.R. (4th) 385, 399-401 (Can.); *Mabo [No. 2]*, 175 C.L.R. at 58; *Amodu Tijani*, 3 N.L.R. at 53-54; Slattery, *supra* note 19, at 758.

23. *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353-54 (1941); *Mabo [No. 2]*,

¶19 In a decision with far-reaching implications for the property regime of an entire country, the High Court of Australia in *Mabo v. Queensland* [No. 2][24] upheld the aboriginal or native title of the Meriam people of the Murry Islands. In the leading judgment of the case, Justice Brennan explained the basis for aboriginal rights, particularly native title, as follows:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.
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> ....
>
> [N]ative title... may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence... whether possessed by a community, a group or an individual.... Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as a identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.[25]

¶20 In rendering the leading opinion in *Delgamuukw v. British Columbia*,[26] the Canadian Supreme Court's most recent affirmation of aboriginal rights doctrine, Chief Justice Lamer described the source of aboriginal title as follows:

> [A]boriginal title arises from the prior occupation... by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second,

175 C.L.R. at 58-60; *Paul*, 2 S.C.R. at 677 (citing Attorney-General for Quebec v. Attorney-General for Canada [1921] 1 A.C. 401, 408); The Queen v. Symonds [1847] 1840-1932 N.Z.P.C.C. 387 at 389-90.

24. 175 C.L.R. 1.

25. *Id.* at 58, 61.

26. [1997] 153 D.L.R. (4th) 193, 258 (Can.).

> because aboriginal tile originates in part from pre-existing systems of aboriginal law. The law of aboriginal title does not, however, only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day.[27]

¶21 In the jurisprudence of the U.S. Supreme Court, aboriginal title, often referred to as original or Indian title, arises from patterns of use and occupancy originating in "time immemorial."[28] In a line of decisions that dates back to the early nineteenth century, the U.S. Supreme Court has described such Indian title as entailing rights of occupancy with the underlying fee title in the United States.[29] Yet the Court has held that the "right of the Indians to occupancy is as sacred as that of the United States to the fee."[30]

¶22 Such judicial renderings of the relevant common law stand as important, if not determinative, markers for an assessment of the rights of the Maya in Belize, a common law jurisdiction. Courts in Belize and its colonial predecessor have not explicitly recognized or rejected the doctrine of aboriginal rights. As a domestic constitutional matter, Belize is free to develop its common law independently of other jurisdictions. Nonetheless, the common law of Belize flows from the same theoretical origins as that of Australia, Canada and other jurisdictions that have pronounced in favor of aboriginal rights.[31] This theoretical unity of the common law requires serious consideration, if not a presumption in favor, of the existence of doctrine embracing aboriginal rights within the common law of Belize.

¶23 It is arguable that failure to accord legal recognition to the historical and customary land tenure patterns of the Maya would be incompatible with the modern precepts of nondiscrimination and racial equality that are affirmed in the Constitution of Belize.[32] Importantly, the Australian High Court in *Mabo* [No. 2] grounded its rendering of the common law doctrine of aboriginal rights in the values it considered foundational to contemporary Australian society, specifically values of equality which form part of the bedrock of the constitutional orders of modern democracies. The *Mabo* [No.2] decision reversed longstanding Australian judicial doctrine that had declined to accord legal significance to historical indigenous land tenure. The High Court expressly rejected the theory of *terra nullius* (uninhabited lands) which previously had been used to ignore the customary land use patterns of aboriginal peoples and hence to deny them legal entitlement based on those patterns. Justice Brennan

27. *Id.* at 246-47 (Lamer C.J.).

28. Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1984). *See generally* Cohen, *supra* note 19 (discussing aboriginal title in the United States).

29. *See* United States v. Cook, 86 U.S. (19 Wall.) 591, 592-93 (1873); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

30. *Cook*, 86 U.S. at 593.

31. This adherence to common law flows from Belize's colonial origins. *See supra* note 1.

32. *See* BELIZE CONST. arts. 3, 16.

described the earlier refusal to validate legally the presence and customary land tenure of aboriginal peoples as "unjust and discriminatory,"[33] and as inconsistent with the contemporary values of Australia that are reflected in its nondiscrimination laws and related international treaty obligations.[34] Brennan admonished that "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination."[35] Likewise, the common law as understood to apply in Belize should not be, nor be seen to be, mired by discriminatory attitudes toward the aboriginal Maya peoples, but rather should be grounded in contemporary values of equality and human dignity of the contemporary world.

¶24 In addition to prohibiting discrimination on the basis of racial or ethnic characteristics,[36] the Constitution of Belize protects against the arbitrary deprivation of property, prescribes certain procedures for the taking of property by the government, and guarantees just compensation for such takings.[37] These constitutional protections of property, which expressly apply to property "of any description,"[38] extend fully to the common law property rights of the Maya. To hold otherwise would discriminate against the Maya's property rights, and hence against the Maya. This result would appear to be unconstitutional under the Constitution's prohibitions against discrimination on the basis of race or ethnicity.[39]

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33. Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 42 (Austl.).
34. *See id.*
35. *Id.* at 41-42.
36. *See* BELIZE CONST. art. 16.
37. *See id.* arts. 3, 17.
38. *Id.* art. 17(1).
39. In *Mabo v.Queensland*, (1988) 166 C.L.R. 186 (Austl.), Justices Brennan, Toohey, and Gaudron, in a joint judgement, expressed the majority view that negative differential treatment of aboriginal rights by official organs of the state is racially discriminatory. With respect to the aboriginal rights of the Miriam people, the Justices viewed such differential treatment as "impair[ing] their human rights while leaving unimpaired the human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people." *Id.* at 218. In the same vein, in *Mabo v. Queensland* [No.2], (1992) 175 C.L.R. 1 (Austl.), Justice Brennan represented the majority view in characterizing as "unjust and discriminatory" the past failure of the Australian legal system to embrace and protect aboriginal rights. *Id.* at 42.
The modern, human rights oriented approach of the Australian High Court in this respect contrasts with that of the U.S. Supreme Court in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In that case, the Supreme Court declined to consider aboriginal title fully as property within the meaning of the protections generally accorded property by the Fifth Amendment to the U.S. Constitution. In writing for the majority, Justice Reed regarded Native Americans as conquered peoples whose rights arising from original occupation were without protection from purposeful acts of extinguishment by the United States. He said, "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral rights by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale by the conquerors' will that deprived them of their land." *Id.* at 289-90. Justice Reed's assessment has been widely criticized for being descriptively inaccurate and normatively problematic at best. *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 82 (1993) (noting the "obvious ethnocentricity" in the *Tee-Hit-Ton* opinion); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 32-33

C. Common Law Aboriginal Rights in Light of Contemporary International Law

¶25 The Australian High Court's decision in *Mabo v. Queensland* [No. 2] further indicates that, just as the common law of aboriginal rights draws from bedrock principles evident in the domestic legal order, it also is shaped by related norms embraced by the world community that are now part of, or becoming part of, international law. Justice Brennan stressed that "international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[40] Courts throughout other common law jurisdictions generally have held that a country's domestic law, if at all possible, should be construed to conform to relevant international norms.[41] Any state that does not do so risks international illegality.

¶26 In recognizing the existence of common law aboriginal rights in *Mabo* [No. 2], Justice Brennan specifically cited Australia's obligations under the International Covenant on Civil and Political Rights.[42] Belize is also a party to the International Covenant on Civil and Political Rights,[43] and hence the Covenant also informs an assessment of the existence and character of common law rights in Belize. The Covenant broadly upholds principles of nondiscrimination,[44] which Justice Brennan saw as requiring recognition by the common law of indigenous peoples' customary land tenure.[45] The International Convention on the Elimination of All Forms of Racial Discrimination[46] includes similar nondiscrimination provisions, particularly with respect to property rights.[47] In a recent comment

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(1996) (criticizing the *Tee-Hit-Ton* opinion); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1215-17 (1980) (same).

40. *Mabo [No. 2]*, 175 C.L.R. at 42.

41. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains."); Slaight Communications, Inc. v. Davidson [1989] 59 D.L.R. (4th) 416 (Can.) (stating that "Canada's international human rights obligations should inform . . . interpretation" and that "the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective."); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 50 (4th ed. 1990) ("[T]he English courts have regularly taken into account treaty-based standards concerning human rights in order to resolve issues of common law . . .").

42. *See Mabo [No. 2]*, 175 C.L.R. at 42 (citing the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) http://www.umn.edu/humanrts/instree/b3ccpr.htm (visited Mar. 28, 1998) [hereinafter ICCPR]).

43. *See* United Nations, *United Nations Treaty Collection* http://www.un.org/Depts/Treaties/collection/series (visited May 1, 1998).

44. *See* ICCPR, *supra* note 42, arts. 2, 3, 14, 24-26.

45. *See Mabo [No. 2]*, 175 C.L.R. at 42-43.

46. *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

47. *See id.* art. 5(d)(v) (affirming the obligation to eliminate racial discrimination in regard to the "right to own property alone as well as in association with others").

interpreting the obligations of states under the Convention, the United Nations Committee on the Elimination of Racial Discrimination issued a call

> upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.[48]

¶27 Article 27 of the Covenant on Civil and Political Rights has further implications in this respect:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[49]

¶28 The United Nations Human Rights Committee, the body charged with overseeing compliance with the Covenant, has confirmed that, when indigenous groups are concerned, traditional land tenure and resource use is an aspect of the enjoyment of culture protected by Article 27. In *Ominayak, Chief of the Lubicon Lake Band v. Canada*,[50] the Committee construed the cultural rights guarantees of Article 27 of the Covenant to extend to "economic and social activities" involving land and resource use, upon which the Lubicon Lake Band of Cree Indians relied as a group.[51] The Committee found that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the Band.[52]

¶29 Aboriginal rights to land and resources, therefore, are not just a matter of property but also a matter of cultural integrity protected by Article 27. Land and resources are important to indigenous cultures both intrinsically and instrumentally: intrinsically insofar as land and other natural elements, and the activities directly related to them such as hunting and gathering, are themselves part of the matrix of beliefs and behavioral patterns that establish group identity; and instrumentally insofar as a land

48. Committee on the Elimination of Racial Discrimination: General Recommendation XXIII, para. 5, adopted Aug. 18, 1997, U.N. Doc. CERD/C51/Misc. 13/Rev. 4 (1997).

49. ICCPR, *supra* note 42, art. 27.

50. Comm. No. 167/1984, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Annex 9, U.N. Doc. A/45/40 (1990).

51. *Id.* at 27.

52. *See id.*; *see also* Länsman et al. v. Finland, Comm. No. 511/1992, Hum. Rts. Comm., 58th Sess., para. 9.3, U.N. Doc. CCPR/C/52/D/511/1992 (1994) http://www.austlii.edu.au/ahric/hrcomm/920511.html (visited Mar. 28, 1998) (finding that reindeer herding is a part of Saami indigenous culture protected by Article 27); Kitok v. Sweden, Comm. No. 197/1985, U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, Annex 7(G), at 229, U.N. Doc. A/43/40 (1988) (holding that Article 27 extends to economic activity "where that activity is an essential element in the culture of an ethnic community").

and resource base provide the geographic space or economic means for an indigenous culture to survive.

¶30 Beyond the specific treaty obligations assumed by Belize under the Covenant on Civil and Political Rights, other related international standards are generally accepted by the international community. Insofar as international standards are already or are becoming generally accepted, courts should use them as interpretive tools, even if they appear in unratified treaties or in other instruments that may be considered nonbinding.[53]

¶31 Over the last several years, international institutions and states worldwide have devoted increasing efforts toward safeguarding the rights of indigenous peoples, including rights over land and resources, and in the process have been developing international standards to uphold these rights.[54] The contemporary international consensus concerning indigenous land rights in particular is reflected in the International Labour Organization Convention (No. 169) on Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO Convention No. 169).[55] This multilateral treaty specifically affirms indigenous peoples' "rights of ownership and possession . . . over the lands which they traditionally occupy" and further upholds "the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[56] Although Belize has not yet ratified ILO Convention No. 169, the Convention's land rights provisions represent newly developing customary international law which, once crystallized is generally binding on states.[57]

¶32 ILO Convention No. 169 is part of a larger body of developments that have generated new international norms concerning indigenous peoples' rights. Among these other developments is the drafting of a declaration on indigenous rights by an expert body of the United Nations for consideration by the U.N. General Assembly.[58] The Inter-American

53. *See* Trop v. Dulles, 356 U.S. 86, 101-02 (1957) (stating that a constitutional norm should "draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

54. *See generally* Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM RTS. J. 33 (1994) (describing the development of indienous peoples' legal rights).

55. Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organization, June 27,1989, *reprinted in* INTERNATIONAL LABOUR ORGANIZATION, 3 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1977-1995 at 324, 328 (1996) ftp://ftp.halcyon.com/pub/FWDP/International/ilo_169.txt (visited July 14, 1998) [hereinafter ILO Convention No. 169].

56. *Id.* art. 14(1). Article 13(1) of the ILO Convention No. 169 states, "Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." *Id.* art. 13(1).

57. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 49-58, 104-07 (1996); *see also* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 155-63 (1991) (discussing the emergence of indigenous rights as an international norm).

58. *See* Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted Aug. 26, 1994, at 105, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994), *reprinted in*

Commission on Human Rights similarly has developed and proposed a declaration on indigenous rights for adoption by the Organization of American States.[59] Both these draft instruments contain provisions that reaffirm the principles of indigenous land and resource rights contained in ILO Convention No. 169.[60] In commenting on these drafts, states generally have indicated their acceptance of the core elements of the articulated land rights principles, despite disagreements over specific wording and the outer parameters of the rights.[61] Additionally, provisions of other instruments that already have been adopted by international institutions or states through international conferences reiterate and confirm these precepts of indigenous rights over lands and resources.[62]

D. The Basic Criteria for Establishing Aboriginal Rights and Their Application to the Maya of Southern Belize

¶33 A body of common law jurisprudence, therefore, is joined by international standards to uphold aboriginal peoples' legally enforceable rights on the basis of historically-rooted customary practices. While courts and international authorities have varied in their articulation of the threshold criteria for establishing the existence of aboriginal rights in lands and resources, the essence of these criteria can be reduced to the following:

> (1) existence of a culturally distinctive community or society with historical origins that predate the effective exercise of sovereignty by the state or its colonial precursor; and

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34 I.L.M. 541 http://www.hawaii-nation.org/iitc/decltext.html (visited July 14, 1998) [hereinafter Draft United Nations Declaration on the Rights of Indigenous Peoples].

59. *See* Proposed American Declaration on the Rights of Indigenous Peoples, Feb. 26, OEA/Ser/L/11.95, doc. 6 (1997) http://www.oas.org/EN/PROG/indigene.htm [hereinafter Proposed American Declaration on the Rights of Indigenous Peoples].

60. *See* Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 58, arts. 25-28 at 111-12; Proposed American Declaration on the Rights of Indigenous Peoples, *supra* note 59, art. 18.

61. *See* ANAYA, *supra* note 57, at 53-56 & nn.103-04, 107 & nn.87-88 (discussing government statements at international conferences).

62. *See, e.g.*, Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Eur. Par. Doc. 1994 J.O. (C61) 69,70 (adopting ILO Convention No. 169 and reiterating importance of indigenous peoples' rights); U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, pt. 1 para. 20, pt. 2 paras. 28-32, U.N. Doc. A/CONF.157/23 (1993), *reprinted in* 32 I.L.M. 874 http://www.unhcr.ch/html/menu5/d/vienna.htm (visited Mar. 28, 1998) (emphasizing the importance of the rights of indigenous peoples, and calling on states to protect those rights); U.N. Conference on Environment and Development: Rio Declaration on Environment and Development, princ. 22, U.N. Doc. A/CONF.151/26 (1992) (emphasizing importance of indigenous people in environmental management and development); U.N. Conference on Environment and Development: Agenda 21, ch. 26, U.N. Doc. A/CONF.151/26 (1992) (recognizing the need to strengthen the role of indigenous peoples and their communities); *World Bank Operational Manual*, Operational Directive 4.20 (1991) (visited Mar. 23, 1998) http://www.worldbank.org/html/fpd/cm/power/wbpolicy/420OD.stm (providing policy guidance to ensure that development policies do not harm indigenous peoples, and stressing the need for their participation in planning any development projects).

(2) customary or traditional land tenure or resource use that can be identified as a part of the cultural life of the community or society.

The above criteria represent a synthesis of relevant common law precedents, viewed in light of established and emerging international norms.[63]

¶34 The Maya parties in *TMCC v. Attorney General* have presented documentary evidence that, along with the judicially noticeable historical record, establishes *prima facie* that their situation meets both of these criteria. This documentation includes affidavits by Maya individuals[64] and reports by two anthropologists,[65] an archeologist,[66] and a geographer[67] who have done extensive original research on the Maya of Belize.

¶35 Regarding the first of the above criteria, the evidence establishes beyond question that the Kekchi and Mopan speaking populations who currently inhabit the Toledo District comprise culturally distinctive communities that are part of the larger indigenous Maya people. People who are identified as Maya have for centuries formed organized societies that have inhabited a vast territory—which includes the Toledo District of southern Belize—long before the arrival of Europeans and the colonial institutions that gave way to the modern state of Belize.[68] Among the historical and contemporary Maya people of the Middle American region that encompasses Belize, distinct linguistic subgroups and communities

63. *See, e.g.*, United States v. Santa Fe Pacific R.R. Co., 341 U.S. 339 (1941) (stating that original Indian land rights exist on the basis of historical use and occupancy); Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 69-70 (Austl.) (holding that native title was not extinguished when there was continued use of the land by indigenous peoples in keeping with their laws and customs); R. v. Van Der Peet [1996] 137 D.L.R. (4th) 289 (Can.) (holding that activities that are integral to the practice and custom of indigenous culture and that existed prior to contact with the colonizing society are aboriginal rights under Canadian law); Amodu Tijani v. Secretary, S. Provinces, 3 N.L.R. 21 (P.C. 1921) (appeal taken from Nig.) (recognizing native title as a communal right that was not extinguished by the British government). International authorities also have emphasized the role of historical and customary land use in determining indigenous rights. *See* Proposed American Declaration on the Rights of Indigenous Peoples, *supra* note 59, art. 18; Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 58, arts. 25-30; ILO Convention No. 169, *supra* note 55, arts. 1, 13-19.

64. *See* Affidavit of Leonardo Acal at 1, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510); Affidavit of Julian Cho at 1, *TMCC* (No. 510); Affidavit of Sebastian Choco at 1, *TMCC* (No. 510); Affidavit of Santiago Chub at 1, *TMCC* (No. 510).

65. *See* Grant D. Jones, Historical Perspectives on the Maya-Speaking Peoples of the Toledo District, Belize 1-22 (1997) (unpublished manuscript, on file with *Yale Human Rights and Development Law Journal*), *appended to* Affidavit of Grant D. Jones, *TMCC* (No. 510); Richard R. Wilk, Mayan People of Toledo: Recent and Historical Land Use 1-10 (Feb. 16, 1997) (unpublished manuscript, on file with *Yale Human Rights and Development Law Journal*), *appended to* Affidavit of Richard R. Wilk, *TMCC* (No. 510).

66. *See* Richard M. Leventhal, Maya Occupation and Continuity in Toledo 1-10 (Feb. 24, 1997) (unpublished manuscript, on file with *Yale Human Rights and Development Law Journal*), *appended to* Affidavit of Richard M. Leventhal, *TMCC* (No. 510).

67. *See* Bernard Nietschmann, Report on the System of Customary Practices of the Maya in Southern Belize 1-13 (July 1997) (unpublished manuscript, on file with *Yale Human Rights and Development Law Journal*), *appended to* Affidavit of Bernard Nietschmann, *TMCC* (No. 510).

68. *See* Leventhal, *supra* note 66, at 1-2.

have existed and evolved within a system of interrelationships and cultural affiliations.[69]

¶36 The expert reports submitted by the Maya parties show that the contemporary Mopan and Kekchi people of the Toledo District are the descendants or relatives of the Maya subgroups that inhabited the territory at least as far back as the time of European exploration and incursions into Toledo in the seventeenth and eighteenth centuries.[70] On the basis of extensive research, Professor Grant Jones, one of the foremost authorities on the Maya of southern Belize, concludes that "without any doubt the Mopan population of the Toledo District has ancestral roots in the area that long predate British colonial claims over the territory."[71] Although the matter is more complex with respect to the Kekchi Maya, Professor Jones finds, and in his report details, ample evidence to establish that they likewise have ancestral roots in the earlier population.[72] Additionally, Professor Richard Wilk, another leading authority on the Maya of southern Belize, confirms that "[i]t is quite possible that Kekchi, mixed Kekchi-Chol, or mixed Kekchi-Mopan habitation of Toledo goes back to the 1600s."[73]

¶37 Government attorney Jose Cardona disputes Professor Jones' account of Maya ethnography and history. He offers a different account—one that portrays, in rather simplistic terms, the contemporary Kekchi and Mopan as immigrant groups with no ancestral linkages to the Toledo territory that predate British settlement.[74] Mr. Cardona's alternative account, however, fails in light of the totality of the evidence presented. Unlike the expert reports submitted by the Maya parties, Mr. Cardona's affidavit does not appear to be based on any special expertise over the subject matter nor on much original research. Mr. Cardona simply makes a vague assertion that he has researched the matter, and cites works written by others, including Professor Wilk.[75]

¶38 The only original research offered by Mr. Cardona with respect to Maya ethnography is a document that purports to demonstrate that otherwise unidentified surnames of individuals have particular national associations, most of them Guatemalan. In his second affidavit, Professor Jones addresses this argument and explains why it is not of value to an assessment of Maya origins:

> As I have demonstrated,... the historical origins of Maya surnames in the Toledo District must be examined in terms of the

69. *See* GRANT D. JONES, MAYA RESISTANCE TO SPANISH RULE 93-94 (1989).

70. *See generally* Second Affidavit of Grant D. Jones, *TMCC* (No. 510) (reiterating modern evidence that indicates the presence of Maya peoples in the 16th century); Jones, *supra* note 65 (describing the history of land use by Maya peoples in the Toledo district); Wilk, *supra* note 65 (summarizing the 19th century interactions between Maya people and the Spanish).

71. *See generally* Jones, *supra* note 65, at 9, 14-18 (reviewing the geographical extent of Mopan populations in the 16th and 17th centuries).

72. *See id.* at 9-14.

73. Wilk, *supra* note 65, at 2.

74. *See* Affidavit of Jose A. Cardona at 3-4, *TMCC* (No. 510).

75. *See id.* at 4 (citing Chapter 4 of RICHARD R. WILK, HOUSEHOLD ECOLOGY (1991)), *appended to* Affidavit of Jose A. Cardona, *TMCC* (No. 510)).

> history of Spanish colonialism, which knew no national boundaries. People had moved back and forth for centuries between territories that were only later to become national boundaries. The international distribution of surnames worldwide, especially in ethnically complex countries such as Belize, makes such an exercise one of futility. We know as a fact that during the seventeenth century, long before there was a British Honduras, a Guatemala, and a Mexico, that names of Mayas living in what is now Belize (including the Toledo District) were also common in what are now Guatemala and Mexico.[76]

¶39 Furthermore, the published works cited by Mr. Cardona and appended to his affidavit do not support his assertion that the Kekchi and Mopan are disconnected from the historical Maya. These materials confirm that substantial numbers of Mopan and Kekchi Maya people began migrating into the Toledo territory from Guatemala in the late nineteenth century.[77] Nothing in these publications, however, disproves that these migrating groups are ethnographically connected to the Maya people who previously inhabited the territory. In his second affidavit, Professor Wilk states without equivocation that Mr. Cardona has misrepresented his work *Household Ecology*, one of the appended publications.[78] Further contrary to Mr. Cardona's account, the appended work by Eric Thompson, based on research carried out prior to 1972, suggests linkages between the Manche Chol Maya, who historically inhabited the Toledo territory but were driven from it by the Spaniards, and the Kekchi and Mopan groups that later migrated into the territory:

> [Kekchi Maya] . . . have expanded enormously in the past three centuries, absorbing many former Manche Chol communities in Alta Verapaz, and then advancing to the Usumacinta, Cancuen, and Sarstoon Rivers, and finally crossing into the Toledo District late in the nineteenth century.[79]

¶40 In his reliance on Thompson and others who wrote years ago without specifically addressing the issue at hand, Mr. Cardona gives an account of history that apparently has been mythologized in Belize

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76. Second Affidavit of Grant D. Jones at 4, *TMCC* (No. 510).

77. *See* Affidavit of Jose A. Cardona at 3-4, *TMCC* (No. 510)

78. *See* Second Affidavit of Richard R. Wilk at 1, *TMCC* (No. 510).

79. J. ERIC S. THOMPSON, THE MAYA OF BELIZE: HISTORICAL CHAPTERS SINCE COLUMBUS 47 (1972), *appended to* Affidavit of Jose A. Cardona, *TMCC* (No. 510). Elsewhere Thompson argues that the Spaniards did not successfully remove all of the Manche Chol from southern Belize. *See infra* note 99. Thompson himself acknowledged that his rendition of Maya ethnography and history was not complete, characterizing his research as one based primarily on the writings of the European colonizers "whose way of life and outlook differed widely from those of the Maya, whom, neither understanding nor having any wish to do so, they sought to incorporate, but as an inferior race, into their culture." *See* THOMPSON, *supra*, at 34. Thus, Thompson effectively invited further research beyond the colonizer's account.

(especially by those who wish to minimize the significance of the Maya presence) but which can no longer be accepted uncritically in light of research carried out in recent years. Building upon his own previous research and that of others such as Dr. Thompson, Professor Jones argues convincingly that the historical data now available render the Cardona myth untenable. He does so by showing ethnographic continuity between the Maya that inhabited the Toledo territory prior to British settlement and the present day Toledo Maya.[80]

¶41 The weight of the evidence presented by the parties' affidavits, moreover, indicates a continuity in Maya society and land use in the Toledo territory that extends back, not just to the time of European contact, but to ancient times. Professor Richard Leventhal, an eminent archeologist who specializes in the ancient Maya of Belize, states in his report that Maya occupation of the area of the Toledo District extends back to at least 400 A.D. As just noted, ancestral linkages have been shown to exist between the Maya living in Toledo today and those living in the territory at the time of European contact in the seventeenth and eighteenth centuries. Given the limitations of available scientific data, however, there is insufficient basis to establish clear ancestral linkages between the Maya in Toledo during the period of early European contact in the fifteenth century and the ancient Maya that lived within the same territory over 1000 years earlier.[81] It is virtually impossible in any situation to establish conclusive proof of direct genealogical connections between an aboriginal group in existence at the time of European contact and its predecessors who lived centuries before. Nonetheless, scientists are able to establish linkages between ancient and more recent groups through an assessment of relevant ethnographic patterns.

¶42 Thus, on the basis of his years of research on the Maya, Professor Leventhal concludes that there is "cultural continuity in terms of the existence of a Maya cultural group within the region of Toledo in the ancient times, at the time of the Spanish contact, and in modern times with

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80. *See* Second Affidavit of Grant D. Jones, *TMCC* (No. 510). Professor Wilk, who once questioned Thompson's theory linking the Kekchi and the Manche Chol, states the following in the preface to the most recent edition of his book, *Household Ecology*, which will soon be in print:

> The documentary evidence, which I present in this book, for continuing migration of Kekchi into southern Belize is quite clear from the 1890s onward. But today I would not reject the possibility that the people we presently call Kekchi are also descended, in part, from the original Chol inhabitants of Toledo District. My statements in this book on the matter are unduly negative. Lacking a thorough study by a professional linguist, or a more exhaustive search of the ethnohistoric record, I do not think Thompson's argument can be convincingly rejected. Moreover, Grant Jones, a distinguished ethnohistorian of Belize, has recently found evidence, as yet unpublished, that the modern Mopan Maya did live in the Toledo District when the Spanish arrived in the 16th century. Their well-documented migration from Guatemala to San Antonio in Belize in 1886 was actually a return to their ancestral homeland.

RICHARD R. WILK, *Preface to* HOUSEHOLD ECOLOGY (June 20, 1997) (forthcoming).

81. *See* Leventhal, *supra* note 66, at 7.

the Kekchi and Mopan today."[82] Under the doctrine of aboriginal rights, the existence of such cultural continuity, more so than genealogical linkages, is what matters in establishing aboriginal rights to land.[83] The government has provided nothing credible to controvert the assertation that today's Kekchi and Mopan are cultural subgroups that have evolved from the same larger Maya society that has manifested itself throughout Middle America, including the Toledo territory, since ancient times.[84]

¶43 Professor Wilk's report explains that today most of the Maya in Toledo live in thirty-seven or so communities that are held together by several distinctive governing and social institutions that are derived from historically-rooted Maya cultural patterns.[85] The principal political figure in each Maya village is the *alcalde*, an authority who oversees community affairs in coordination with other leadership figures and village councils.[86] In his affidavit, Mr. Cardona suggests that the *alcalde* system has its sole origins in British colonial administration and laws.[87] But responding to Mr. Cardona, Professor Wilk states:

> This is absolutely not true. The Alcalde system is found in various forms among all Mayan-speaking groups in Honduras, Guatemala, and Mexico as well as Belize, in areas the British never ruled. The social organization of the Kekchi has deep roots in prehispanic practices, as well as in the early colonial era when Toledo district was a Spanish possession. The British administration adapted its laws to existing native practice (this was common to the system of indirect rule practiced throughout the British Empire), rather than vice versa.[88]

Thus, according to Professor Wilk, the *alcalde* system that today functions within the network of Maya communities in Toledo, along with other Maya political and social institutions, signifies the resilience and continuity of indigenous Maya society in the District.

¶44 The Mayan case also meets the second criterion for establishing aboriginal title. Unchallenged evidence submitted by the Maya parties in *TMCC v. Attorney General of Belize* shows that the Kekchi and Mopan communities that today exist in the Toledo District have maintained through the present a customary system of land tenure and resource use in

82. *Id.*

83. The doctrine of aboriginal rights seeks to protect connections of cultural patterns rather than mere blood ancestry. *See supra* notes 19-62 and accompanying text (discussing authorities that identify indigenous systems of law and customs as a basis for aboriginal rights).

84. *Cf. Simon v. The Queen*, (1986) 24 D.L.R. (4th) 390, 392 (holding that it was not necessary to establish a direct ancestral link between a Micmac individual living today and the Micmac people who signed a treaty with the British in 1752 in order for the individual to benefit from the treaty).

85. *See* Wilk, *supra* note 65, at 4.

86. *See id.*

87. *See* Affidavit of Jose A. Cardona at 6-7, *TMCC* (No. 510).

88. Second Affidavit of Richard R. Wilk at 2, *TMCC* (No. 510).

a substantial part of the District. This customary system, of which the *alcalde* and other authorities are an important part, includes well-defined rules and mechanisms of control that regulate land and resource use within and among villages, and it is one of the defining characteristics of contemporary Maya culture in Toledo.[89] The centrality of customary land tenure and resource use to Maya survival and culture is highlighted by the affidavits by Maya individuals.[90] These affidavits provide first-hand accounts of Maya agricultural, hunting, fishing, and gathering practices, and uses of forests woods. Professor Wilk explains that the contemporary Maya system of land use has been in existence since at least the early part of this century, "but probably much earlier, because it is a key element of traditional economic organization among these native American groups."[91]

¶45 The documentary evidence establishes that contemporary Maya land use and occupancy is the extension of a centuries-long system of land tenure and resource use throughout a territory that includes the Toledo District, despite periodic disruptions caused by internal or external factors. Professor Leventhal has documented archeological evidence that indicates Maya occupancy of small cities and use of adjacent lands throughout the Toledo territory as early as 350-400 A.D.[92] Professors Jones and Wilk have found patterns of Maya occupancy and land use in Toledo and the areas of the logging concessions since the sixteenth century.[93]

¶46 In rendering the lead opinion of the Supreme Court of Canada in *Delgamakwu v. British Columbia*,[94] Chief Justice Lamer stressed that in order to prove the existence of aboriginal rights in land,

> there is no need to establish an "unbroken chain of continuity" between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk . . . "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land. In *Mabo*, . . . the High Court of Australia set down

89. This customary system is described in detail in the reports by Professors Richard Wilk and Bernard Nietschmann, and is illustrated graphically in the maps attached to Professor Nietschmann's affidavit. *See* Nietschmann, *supra* note 67, at 6-12; Wilk, *supra* note 65, at 3-8; HAND-DRAWN MAPS OF MAYA VILLAGES IN THE TOLEDO DISTRICT MAYA COMMUNAL LANDS, *appended to* Affidavit of Bernard Nietschmann, *TMCC* (No. 510); MAP OF INDIAN RESERVATIONS, AND LOGGING CONCESSIONS, *appended to* Affidavit of Bernard Nietschmann, *TMCC* (No. 510); MAP OF MAYA LANDUSE IN THE TOLEDO DISTRICT, SOUTHERN BELIZE, *appended to* Affidavit of Bernard Nietschmann, *TMCC* (No. 510). The maps appended to Professor Nietchmann's report were produced by the TMCC and the Toledo Alcaldes Association with his assistance and are published in the MAYA ATLAS, *supra* note 6.

90. *See* Affidavit of Leonardo Acal at 1-2, *TMCC* (No. 510); Affidavit of Julian Cho at 1-2, *TMCC* (No. 510); Affidavit of Santiago Chub at 1-2, *TMCC* (No. 510); Affidavit of Sebastian Choco at 1-2, *TMCC* (No. 510).

91. Wilk, *supra* note 65, at 3.

92. *See* Leventhal, *supra* note 66, at 3; Wilk, *supra* note 65, at 3-8.

93. *See* Jones, *supra* note 65, at 5-8.

94. Delgamuukw v. British Columbia, [1997] 153 D.L.R. (4th) 193.

> the requirement that there must be "substantial maintenance of the connection" between the people and the land.[95]
>
> Chief Justice Lamer added:
>
> I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained.[96]

¶47 In the Maya case, the requisite "connection between the people and the land" has been established. The expert reports demonstrate that the modern Kekchi and Mopan have perpetuated a tradition of Maya land use and occupancy in the Toledo territory within the framework of land tenure patterns characteristic of Maya society since pre-contact times. For centuries, the Maya system of land use has consisted of migratory patterns among Maya subgroups in connection with shifting cultivation and hunting and gathering activities.[97] These customary patterns of migration were greatly affected by the Spanish incursions beginning in the sixteenth century and by the British during later periods. Perhaps most notably, at various times between the middle sixteenth and early eighteenth centuries, the Spanish forcibly removed from the Toledo territory large numbers of Maya people, including Mopan and Kekchi-related groups.[98] The European incursions, however, did not succeed in *permanently* depopulating the area of Maya people. The evidence indicates the likelihood that at least some Maya remained in the area through the removal period until large numbers of Maya began returning in the late nineteenth century.[99]

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95. *Id.* at 257-58 (citations omitted).
96. *Id.* at 258.
97. *See* Leventhal, *supra* note 66, at 7.
98. *See* Jones, *supra* note 65, at 3-8, 14-18; Wilk, *supra* note 65, at 2.
99. Professor Wilk points out that there is "circumstantial evidence that Manche Chol, Kekchi, and Mopan people continued to inhabit and use the forested interior of Toledo district during this period." Wilk, *supra* note 65, at 2. Similarly, Professor Jones also indicates evidence of continuous Maya inhabitation of Toledo, including the areas of the logging concessions. *See* Jones, *supra* note 65, at 5-8; Second Affidavit of Grant D. Jones at 5-7, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510). In contrast, Mr. Cardona's affidavit contends that by the eighteenth century, and until the Mopan and Kekchi migrations in the late nineteenth century, "Toledo was essentially unpopulated." Affidavit of Jose A. Cardona at 3, *TMCC* (No. 510). Mr. Cardona does not address the evidence cited by Professors Wilk and Jones, but simply refers to the work by J. Eric Thompson which is appended to his affidavit. *See id.* Mr. Cardona's reference to Thompson, however, is misleading. Cardona highlights Thompson's account of the forced migration of Maya by the Spaniards and the devastating effects of imported disease. *See id.* But Cardona turns a blind eye to Thompson's earlier work, referenced by Professor Wilk in his report, in which Thompson argued that some Maya escaped the Spaniards, remained in the Toledo territory, and became absorbed by the

¶48 Although historically there has been an ebb and flow in the land use and occupancy patterns of the Maya, they never abandoned their homelands in the area that eventually became southern Belize. The historical record shows that the Maya consistently have resisted efforts by the Spanish and the British to remove them or encroach upon their lands, and that, to the extent possible, they have returned to the lands from which they or their kin have been ousted.[100]

¶49 In addition to the external factors that have affected Maya migratory patterns, the historical Maya system of land use also inherently involved movement. Professor Leventhal points out that "[l]and use patterns of ancient and modern times necessitated a certain amount of movement of communities every 10-15 years in order to maximize the use of the land and the quantity of crops from the land."[101] The contemporary presence of Mopan and Kekchi Maya in Toledo is related to the historical system of Maya land use:

> [T]he gradual movement of the Mopan and K'ekchi into this same region [beginning in the nineteenth century] should also not be surprising. If one looks at a broader picture which includes the land to the south and west and even to the north, the Maya are utilizing these lands for hunting and agriculture from the initial occupation more than 1000 years ago. The clear affiliation of all of the past occupants of the Toledo District was and is Maya—a cultural affiliation and ties which is found throughout all of Belize and the southern parts of Middle America.[102]

¶50 When substantial numbers of Kekchi and Mopan began returning or moving to Toledo in the late nineteenth century, they were simply reclaiming ancestral lands and following the patterns of movement that had long been sustained by Maya subgroups over what had continued to be Maya territorial domain. Professor Jones observes:

> The late nineteenth-century recorded migrations of Kekchis and Mopans to the Toledo District were probably only one example of

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Maya who later migrated to the territory. *See* Wilk, *supra* note 65, at 2 (discussing J. Eric Thompson, *Ethnology of the Mayas of Southern and Central British Honduras*, *in* 17 FIELD MUSEUM OF NATURAL HISTORY ANTHROPOLOGICAL SERIES 23). Later, the remaining Chol intermarried with the Kekchi when the latter migrated into the area in the 1700s, forming a group Thompson called the Kekchi-Chol. *See id.*

100. The Maya subjected the early Spanish colonizers to a "relentless military siege," and migrated back into the Toledo territory just as other Maya were being removed. *See* Jones, *supra* note 65, at 3, 5. The historical record of Maya resistance is incorporated even into the documentation presented by the government, particularly in the excerpt of the work by Nigel Bolland and Assad Shoman that describes late eighteenth and early nineteenth century Maya resistance to British wood cutters and settlers in the territory of present-day Belize. *See* NIGEL BOLLAND & ASSAD SHOMAN, LAND IN BELIZE 1765-1871, at 29 (1977), *appended to* Affidavit of Jose A. Cardona, *TMCC* (No. 510).

101. Leventhal, *supra* note 66, at 7.

102. *Id.*

> the constant movement of native Maya populations back and forth across this border area, which had only recently been defined by international conventions .... I interpret the Maya migrations of the late nineteenth century as a return to a homeland from which they had been removed during the seventeenth and eighteenth centuries by Spanish forces and from which they were also forced to flee due to British-Miskito slave raiding expeditions.[103]

¶51 In sum, the existence of Maya people as organized communities with historical roots that predate the effective exercise of sovereignty by the modern state of Belize or its European colonial precursors, together with the existence of clear patterns of customary land tenure and resource use, point to the existence of Maya aboriginal rights.

III. THE ABSENCE OF ANY SHOWING OF ACTS OR EVENTS SUFFICIENT TO EXTINGUISH MAYA ABORIGINAL RIGHTS

¶52 As just demonstrated, the Maya parties in *TMCC v. Attorney General of Belize* have succeeded in making at least a *prima facie* case for the existence of aboriginal rights in southern Belize. Common law aboriginal rights are generally held to be subject to extinguishment by the governing sovereign. But ordinarily, once a *prima facie* case of aboriginal rights has been made, in order to defeat the claim of aboriginal rights, the government has the burden of showing that the rights have been validly extinguished by some official act or series of acts.[104] The various submissions of the government to the court in *TMCC v. Attorney General of Belize* describe or allude to Spanish acts of conquest, the assertion of British sovereignty over the territory, the establishment of reservations for the Maya, the issuing of patents and leases to others in relation to the claimed lands, and other land administration measures by the British colonial government and the successor government of Belize.[105] The government does not specify the legal import of these acts beyond stating that they preclude the possibility of the claimed Maya property rights. To the extent that these acts are legally relevant, they only are related to the issue of extinguishment.

¶53 The possibility of extinguishment of aboriginal rights under common law doctrine can be seen as substantially mitigating against the survivability of those rights. Historically, the common law accorded broad discretion to the governing state sovereign to extinguish aboriginal rights.[106] The law has now developed, however, such that important

103. Jones, *supra* note 65, at 10.

104. *See* R. v. Sparrow [1990], 70 D.L.R. (4th) 385, 386; Attorney-General of Ontario v. Bear Island Foundation et al., [1984] 15 D.L.R. (4th) 321, 335-36.

105. *See* Affidavit of Richard Belisle at 2-4, *TMCC* (No. 510); Affidavit of Jose A. Cardona at 3-8, *TMCC* (No. 510); Affidavit of Clinton C. Gardiner at 42-43, *TMCC* (No. 510).

106. The extinguishment strain of aboriginal rights doctrine, therefore, historically rendered that doctrine subservient to the colonizing patterns of Great Britain and its offspring states in the Americas and elsewhere. Aboriginal rights existed, but under the common law

counter-mitigating factors now limit the possibility of extinguishment. In the present case, these factors indicate that, despite the multiple acts and events to which it alludes, the government has not met its burden of demonstrating the extinguishment of Maya aboriginal rights. Maya aboriginal rights survive, at least to the extent of ongoing customary land tenure patterns.

¶54 Before any act can successfully extinguish aboriginal rights, it must conform with the relevant legal norms that constrain official or other behavior. In Belize, any act of the government, including any act intended to diminish or extinguish property rights, must be consistent with the Constitution. As noted above, the Belize government would violate the Belize Constitution's prohibitions against discrimination on the basis of race if it does not respect the common law property rights of the Maya.[107] Furthermore, international law accords aboriginal land and resource rights additional protection from extinguishment.[108] ILO Convention No. 169 and other international instruments, provide that indigenous peoples should not be dispossessed of their lands or resources without their consent, absent extraordinary exigencies.[109] The requirement of indigenous consent is derived from bedrock principles of self-determination and equality which are expressed in the United Nations Charter and the International Covenant on Civil and Political Rights,[110] both instruments that Belize has ratified and to which it has bound itself legally.

¶55 The Belize government has not shown that the Maya ever consented to the taking of their aboriginal rights, or that extraordinary exigencies obviate that consent. The government points to a number of acts that have targeted or affected Maya people,[111] but it has not established that these acts were accompanied by Maya consent to relinquish rights or by measures to safeguard Maya cultural integrity. Nor does it appear that,

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they could be taken away unilaterally, without incurring any legal consequences, by the governing state sovereign. *See generally* Newton, *supra* note 8, at 42-43 (critically examining the extinguishment strain of aboriginal rights doctrine as developed in the United States).

107. *See supra* notes 32-39 and accompanying text.

108. Article 27 of the ICCPR substantially constrains the extinguishment prerogative of states with respect to lands and resources that are integral to indigenous cultural integrity in its requirement that governments safeguard indigenous cultures, including those aspects relating to lands and resources. *See supra* note 42 and accompanying text.

109. ILO Convention No. 169, *supra* note 55, art. 16(1), prohibits removal of indigenous peoples from their lands absent their consent, unless it is considered necessary "as an exceptional measure." *Id.* art. 16(2). The Convention prescribes that, in the event of removal, indigenous peoples "shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist." *Id.* art. 16(3). "When such return is not possible . . . these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them." *Id.* art. 16(4). Additionally, the Convention mandates consultations with indigenous peoples on all matters that may affect them in order to achieve agreement or consent. *See id.* art. 6; *see also* Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 58, art. 30 (requiring that states obtain indigenous peoples' consent for any project that may affect their lands).

110. *See* ICCPR, *supra* note 42, art. 1; United Nations Charter art. 1, para. 2; ANAYA, *supra* note 57, at 105 (discussing the relationship between the principle of self-determination and indigenous land rights norms).

111. *See* notes 112, 115, 122, 125 & 126 and accompanying text.

at any time in connection with Maya common law aboriginal rights, the government conformed to the constitutional prescriptions for taking property. In particular, none of the affidavits or documents submitted by the parties suggest that the government has offered or given the Maya people any form of compensation for the taking of their aboriginal property rights.

¶56 Because constitutional protections did not exist prior to Belize's independence in 1981, and strong international protections have only recently emerged, it is debatable whether these modern norms protect aboriginal rights against official acts occurring as far back as the earliest European encroachments into Maya lands. The affidavits submitted by the government describe the European colonial patterns to which the Maya have been subjected. These patterns begin with Spanish acts of conquest and include later British acts of land administration.[112] While the contemporary norms may not in a strict sense apply retroactively, they do enter into a consideration of the continuing legal effect of such historical acts upon the current construction or exercise of rights.[113] In the Maya case, the infusion of contemporary norms into aboriginal rights doctrine deprives Spanish and British colonial acts of the capacity to negate Maya aboriginal rights, at least to the extent that there is ongoing Maya traditional use and occupancy of lands not held in good faith by any private third party today.

¶57 Older cases, decided prior to the proliferation of modern constitutions and internationally recognized human rights, have cited conquest as a basis for extinguishment or diminishment of aboriginal rights.[114] In his affidavit, Mr. Cardona stresses acts of conquest by the Spaniards against the Maya people. Mr. Cardona asserts that, as a result of the Spanish drive against the Maya beginning in the late seventeenth century, "by the eighteenth century, Toledo was essentially unpopulated."[115] Upon this account of Spanish conquest of the indigenous Maya, Mr. Cardona constructs his historical narrative of subsequent British settlement in Belize and the Toledo territory. Mr. Cardona does not suggest that at any time the Maya voluntarily abandoned their lands in the Toledo territory; rather, they were conquered and forced out of those lands.

¶58 First, despite the undisputed brutality and success of the Spanish campaign to overpower the Maya and remove large numbers of them from the Toledo territory, it is far from clear that the Spanish in fact ever fully

112. *See* Affidavit of Jose A. Cardona at 2-8, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510); Affidavit of Clinton C. Gardiner at 2-3, *TMCC* (No. 510).

113. *See generally* Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829, 831 (1928) (discussing intertemporality of legal rules).

114. *See, e.g.*, Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1944) (asserting that Indian title is subject to the power of the "white sovereign alone to extinguish that right by 'purchase or by conquest'"); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny").

115. Affidavit of Jose A. Cardona at 2-3, *TMCC* (No. 510).

succeeded in depopulating the Toledo territory of *all* Maya inhabitants.[116] Moreover, historical acts of conquest—however successful at the time—should not now vitiate Maya rights to lands and resources that the Maya presently occupy and use. Under contemporary international law, indigenous peoples have the right to the lands that they traditionally occupy, notwithstanding any historical act of conquest that may have undermined those rights during the colonial era.[117] Significantly, it appears that no common law court in modern times has held aboriginal rights not to exist solely on the basis of conquest. In *Mabo v. Queensland* [No. 2],[118] the Australian High Court noted that the doctrine of *terra nullius* (uninhabited lands) had historically functioned within Australian law to deny aboriginal people rights over lands that were, in fact, inhabited by them.[119] But the Court ruled that, in light of contemporary norms of nondiscrimination and human rights, the historical application of the doctrine could not permeate the present to undermine customary aboriginal land tenure that survives in the cultural expression of indigenous peoples.[120] Similarly, the abhorrent doctrine of conquest cannot now function to negate Maya aboriginal rights where those rights are otherwise shown to exist.[121]

¶59 The colonial era common law rule of extinguishment was that a colonial sovereign or its legacy could unilaterally extinguish aboriginal rights through an otherwise valid act that was clearly and specifically intended to achieve that result.[122] Even while applying this rule to evaluate historical events, courts in modern times have established a high threshold for finding intent to extinguish rights and have factored in equitable considerations. Thus, apart from contemporary constitutional and international protections, ample precedent exists for the conclusion that the mere assertion of British sovereignty or regulatory authority over the

116. *See supra* notes 79, 99 and accompanying text.

117. Under ILO Convention No. 169, *supra* note 55, art. 14(1), indigenous peoples have "rights of ownership and possession . . . over the lands which they traditionally occupy," that is, lands they occupy through the present according to tradition, independently of any act of conquest or dispossession they may have suffered at some point in history. *Id.* This norm, which is emerging as customary international law, is substantially reflected in the Proposed American Declaration on the Rights of Indigenous Peoples, *supra* note 59, art. 18; the Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 58, arts. 25-28; other international instruments, *supra* note 62; and decisions of the Inter-American Commission on Human Rights, the United Nations Human Rights Committee, and other international bodies. *See* ANAYA, *supra* note 57, at 99-107 & notes.

118. (1992) 175 C.L.R. 1.

119. *See id.* at 41.

120. *See id.* at 42.

121. *See Report on the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, U.N. ESCOR, 45th Sess., Hum. Rts. Comm., Provisional Agenda Item 21, at 10, U.N. Doc. E/CN.4/1989/22, (1989) (concluding that the "concepts of '*terra nullius*', 'conquest' and 'discovery' as modes of territorial acquisition are repugnant, have no legal standing, and are entirely without merit or justification . . . and the legacies of these concepts should be eradicated from modern legal systems").

122. *See* R. v. Sparrow [1990] 70 D.L.R. (4th) 385, 411 (articulating the rule of extinguishment derived from colonial era practice and stating that it applies only as to government acts prior to the Canadian Constitution Act, 1982); Beecher v. Wetherby, 95 U.S. 517, 525 (1877) (restating the rule of historical colonial origins).

Toledo territory, or even the creation of natural resource reserves or other such special administrative units—events highlighted by the government affidavits[123]—were not sufficient to extinguish Maya aboriginal rights.[124] Also, a clear line of judicial authority leads to the conclusion that the establishment of reservations for Maya people earlier in this century did not entail the requisite intent to extinguish aboriginal rights, either within or outside of the reservations.[125]

¶60 As for the effect of British colonial land grants and validation of land claims for the benefit of nonindigenous settlers, the matter is more complex but ultimately points to the same result: Maya rights survive. The affidavits by Mr. Cardona and the Commissioner of Lands and Surveys of the Ministry of Natural Resources, Mr. Clinton C. Gardiner, refer to several acts by the British colonial authority which either created or ratified private interests for the benefit of loggers and other non-Maya settlers in Toledo.[126]

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123. *See* Affidavit of Jose A. Cardona at 4-5, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510). *See generally* Affidavit of Richard Belisle, *TMCC* (No. 510) (summarizing the history of logging and logging permits on traditional Maya lands).

124. *See, e.g,* United States v. Dann, 706 F.2d 919, 931-32 (9th Cir. 1983) (noting that the creation of a federal grazing district that encompassed Indian land did not extinguish aboriginal title), *rev'd on other grounds*, 470 U.S. 39, 49-50 (1985); Wik Peoples v. Queensland, 1996 Austl. High Ct LEXIS 76, 175 (Austl.) (holding that the grant of pastoral does not extinguish native title); R. v. Badger [1996], 133 D.L.R. (4th) 324, 361-62 (holding that the Indian right to hunt was not extinguished by wildlife conservation legislation); *Sparrow*, 70 D.L.R. (4th) at 400-01 (ruling that the fisheries act and regulations did not extinguish aboriginal right to fish); *In Re* the Ninety-Mile Beach, 1963 N.Z.L.R. 461, 477 (holding that a law to reserve lands for public purposes does not extinguish native rights).

125. *See* United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1388 (Ct. Cl. 1975) (holding that the establishment of Indian reservations did not manifest Congressional intent to extinguish aboriginal ownership rights); Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 66 (Austl.) (holding that aboriginal title is not extinguished by the creation of reserves nor by the appointment of "trustees" to manage reserves); *cf.* R. v. Cote [1996], 138 D.L.R. (4th) 385, 398 (holding that off-reservation aboriginal fishing rights were not extinguished by federal and provincial regulations establishing a harvest control regime); Te Runanga o Muriwhenua, Inc. v. Attorney Gen., 2 [1990] N.Z.L.R. 641 (noting that the Maori aboriginal right to fish was not extinguished by a fisheries quota management act).
In his affidavit, Mr. Cardona states that the reservation system was established to pacify and control the Maya. *See* Affidavit of Jose A. Cardona at 7, *TMCC* (No. 510). Mr. Cardona cites Curtis Berkey's *Maya Land Rights in Belize and the History of Indian Reservations* as support for his characterization of the reservation system. *See id.* at 7. Mr. Cardona fails, however, to mention that Berkey concluded that "[t]he creation of reservations did not, therefore, extinguish the aboriginal land rights of the Mayas." CURTIS BERKEY, MAYA LAND RIGHTS IN BELIZE AND THE HISTORY OF INDIAN RESERVATIONS 18 (1994), *appended to* Affidavit of Jose A. Cardona, *TMCC* (No. 510). Professor Wilk describes the impact of the reservation system as follows:

> [T]he reservations did no more than recognize existing occupation, and allow the government to collect an occupancy fee from Indian farmers. Because the boundaries of the reservations were never demarcated on the ground or marked in any consistent way, and these boundaries were enforced only sporadically and intermittently, the reservation system actually had little effect on the village-level administration of land use. In the 1930s the government made several surveys and attempts to enforce reservation boundaries, and restrict new settlement growth, but this effort was largely abandoned by the 1940s.

Second Affidavit of Richard R. Wilk at 2, *TMCC* (No. 510).

126. *See* Affidavit of Jose A. Cardona at 4-6, *TMCC* (No. 510); Affidavit of Clinton G.

Mr. Cardona asserts that at one time "most of southern Belize was privately owned lands but through escheatment, lapse in leases, and acquisition of land in lieu of taxes, most of the Toledo District is now National lands."[127] Mr. Cardona and Mr. Gardiner, however, only provide what are offered as "examples" of the allegedly all encompassing land grants and private estates. The government has not provided sufficient evidence to establish that private estates, created by colonial grants or otherwise, have over time cumulatively covered *all* the lands that are subject to Maya aboriginal rights. In any event, the colonial acts that created or ratified private estates in Toledo should not be held to legally vitiate Maya aboriginal rights, at least over lands that are no longer held privately.

¶61 Common law jurisdictions have differed in considering grants to private third parties and construing their impact on aboriginal rights. Nonetheless, the divergent approaches point to the same result in this case. U.S. courts have held that even a grant of fee simple title to specific land does not extinguish aboriginal rights over the same land, unless otherwise accompanied by a sufficient manifestation of extinguishment intent.[128] Under this rule, British colonial acts granting or ratifying private interests in land, including those interests amounting to freehold title, had no legal effect on Maya aboriginal rights.

¶62 Courts in Canada and Australia, however, have held that an otherwise valid official grant of private rights extinguishes aboriginal rights if the rights granted are incompatible with the preexisting aboriginal rights.[129] The approach taken in Canada and Australia may be justified by reference to the equities that favor private parties who in good faith hold lands under color of valid title. These equities, however, do not weigh against aboriginal rights to the extent that the exercise of the private rights and aboriginal rights over the same lands are in fact compatible. Thus, in *Wik v. Queensland*, the Australian High Court held that the granting of pastoral leases to private parties did not extinguish aboriginal rights insofar as the exercise of aboriginal rights could proceed alongside the authorized grazing.[130]

¶63 Nor do equities weigh in favor of private parties where the private

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Gardiner at 2-3 *TMCC* (No. 510).

127. Affidavit of Jose A. Cardona at 7, *TMCC* (No. 510).

128. *See, e.g.*, United States v. Santa Fe Pacific Railway Co., 314 U.S. 339, 342 (1941) (affirming that, in absence of express language to the contrary, a federal grant of public lands does not constitute extinguishment of Indian occupancy rights); Buttz v. Northern Pacific Railroad, 119 U.S. 55, 66 (1886) (holding that a Congressional grant of fee title to railroad did not extinguish Indian title, and such title was not extinguished until the subsequent relinquishment of land by agreement); Clark v. Smith, 38 U.S. (13 Pet.) 195, 200-01 (1839) (holding that a grantee of fee patent gained an unencumbered title only when the aboriginal title was extinguished by treaty).

129. *See, e.g., Mabo [No. 2]*, 175 C.L.R. at 68 (stating that Crown land grants that are "inconsistent with the continued enjoyment of native title" extinguish such title); R. v. Sioui [1990] 70 D.L.R. (4th) 427, 427 (Can.) (stating that treaty-protected aboriginal rights are subject to extinguishment by inconsistent government land use regime, but designation of land in question as a park found not inconsistent with right of Hurons to engage in customary uses of the land).

130. *See Wik Peoples*, 1996 Austl. High Ct. LEXIS 76, at *179-80.

rights have lapsed by their own terms or by some other presumptively legitimate means. Accordingly, the High Court in *Wik* left open the possibility that, even if an earlier grant of private rights succeeded in extinguishing aboriginal rights, the aboriginal rights may later be revived once the private rights cease.[131]

¶64 It is far from certain that Maya aboriginal rights were incompatible with all, or even some, of the private estates or other land interests granted or ratified by the British colonial authority in Toledo. According to the information provided by the government, the major private land interests went to wealthy foreign or foreign born individuals who sought to control vast areas of land principally for logging, rather than to individuals or families who were seeking to build their homes on the land.[132] In any event, Mr. Cardona's affidavit makes clear that most of the lands in the Toledo District have ceased to be held or claimed by private parties long ago and for quite some time have officially been designated crown or national lands. Thus, even if the past creation or ratification of private rights in Toledo at one time had a negative legal effect on aboriginal rights, that effect should be deemed to have expired as the private rights expired. By the same token, aboriginal rights should be considered revived as Maya people have reestablished traditional land use and occupancy patterns in Toledo in the past century.

¶65 As already stressed, international law upholds traditional patterns of use and occupancy that indigenous peoples sustain as part of their culture independently of historical acts that may have caused a discontinuity in corresponding land rights or use in the past.[133] In this and other respects, international law today looks disdainfully upon colonial patterns, and seeks to purge the contemporary legal order of any manifestation of the oppressive colonial past. The international standard, which elevates present indigenous life over the colonial past, informs an assessment of the relevant common law, with the result that Maya aboriginal rights survive.

IV. THE PARTICULAR CHARACTER OF THE LAND AND RESOURCE RIGHTS OF THE TOLEDO MAYA

¶66 The preceding parts of this Article have argued that the evidence in this case, viewed in light of the applicable legal principles, establishes that the Maya people of the Toledo District have unextinguished aboriginal rights over certain lands in the District. What follows is a brief, general assessment of the character of these Maya aboriginal rights in more narrow geographic-qualitative terms. This assessment concludes that the rights

131. *See id.* at *175 (declining to rule out any concept of "suspension of native title during the currency of the grants").

132. *See* BOLLAND & ASSAD, *supra* note 100, at 75-82; *see also* Second Affidavit of Richard R. Wilk at 2-3, *TMCC* (No. 510) (characterizing most of the grants and leases in the 19th century as "no more than logging concessions; there was no permanent possession or settlement, and no attempt at improving the land or cultivation outside of very small areas").

133. *See supra* Section II.C.

comprise (1) exclusive ownership rights, or aboriginal title, over certain areas; and, in addition (2) rights of access to resources and nonexclusive land use over a larger territorial domain. These rights exist within substantial parts of the logging concessions being challenged by the Maya in *TMCC v. Attorney General of Belize*—at least such parts of the concessions not officially titled to any third party at present.

¶67 Rights originating in long-standing land use or occupancy are not uniform in all cases in which they arise, but rather they vary according to the same patterns that justify their existence. Under certain conditions, occupancy may give rise to rights similar, if not equivalent, to fee simple or freehold title. Other usages may lead to an easement or nonexclusive right of access. In the context of aboriginal rights, the character and scope of the rights are a function of the traditional land tenure and resource use patterns collectively developed by the members of the aboriginal community or communities concerned.[134] Depending on the nature of the relevant land use patterns, aboriginal rights may include full ownership of land, or freestanding rights to hunt, fish, or otherwise use or benefit from resources.[135]

¶68 Although historical ethnographic and cultural roots predating the arrival of Europeans help give rise to aboriginal rights, the present-day character and geographic scope of such rights are not necessarily a direct function of the land use and occupancy patterns as they existed prior to the time of European contact. The law of aboriginal title is not so impervious to the weight of history, as the strain of doctrine allowing for extinguishment makes clear. The Maya of Belize could not reasonably lay claim to the whole of the country on the basis of the territorial dominance of their ancient forebearers. Apart from probably not being legally supportable in light of intervening events and changes in cultural patterns, such an effort would be neither practical nor fair to the non-Maya of Belize. By the same token, the Maya cannot today be denied rights over ancestral lands altogether because of the changes and events of the last centuries.

¶69 Fundamentally, aboriginal rights exist and survive by virtue of a substantial connection between an aboriginal people and land, a connection that arises within a cultural matrix of historical origins and that, like the culture itself, may change over time.[136] Accordingly, the nature and geographic scope of aboriginal rights are a function of that substantial connection along with its changes. For the Maya people of southern Belize, a substantial connection with a certain territory exists in an identifiable system of ongoing land tenure and resource use that has survived multiple acts of conquest and colonization. As discussed above, the modern Mopan and Kekchi living in the Toledo District are the successors to the historical

134. *See* R. v. Van Der Peet [1996] 137 D.L.R. (4th) 289, 310 (Can.) (stating that traditional use and occupancy practices of the indigenous group will define what rights the group continues to enjoy); *Mabo [No. 2]*, 175 C.L.R. at 58 (articulating that indigenous land rights are given content by traditional customs observed by indigenous inhabitants). For a discussion of the variable nature of aboriginal rights, see *supra* notes 19-20 and accompanying text.

135. *See supra* notes 19-20 and accompanying text.

136. *See supra* notes 21-23 and accompanying text.

Maya populations that inhabited the territory since ancient times.[137] Maya rights over lands and resources, which are thus rooted in history, survive in the Toledo District and are defined by virtue of the customary usages and practices that have been continued through the present by the modern Mopan and Kekchi Maya people.

¶70 In his report to the court in *TMCC v. Attorney General of Belize*, Professor Wilk gives a detailed account of customary Maya land use patterns in Toledo.[138] His account is corroborated by Professor Nietchmann's report[139] and appended maps.[140] These reports and maps, along with the maps appended to the initial pleading of the Maya parties in *TMCC v. Attorney General of Belize*, demonstrate the extent and character of traditional Maya land use and occupancy in the Toledo District in modern times. This evidence has not been controverted by the government.

¶71 As Professor Wilk explains, concentric zones of land use encircle each of the thirty-seven or so Maya villages that are scattered throughout the inland parts of the Toledo District. The village zone is that area where dwellings are clustered and where villagers raise fruit and other trees and graze livestock; it typically extends up to two square kilometers.[141] Beyond the village zone is the main agricultural zone where crops are planted within a rotational system, typical of forest-dwelling indigenous peoples throughout the hemisphere, in which fields are cleared from the forest every eight to fifteen years and allowed to lay fallow during the intervening years.[142] This agricultural zone can extend up to ten kilometers from the village center.[143] The next zone includes large expanses of forest lands that are used for hunting and gathering; these forest lands are rarely cultivated but provide a multitude of wildlife and plant resources upon which the Maya depend for survival.[144] Additionally, the Maya regard as sacred numerous sites—usually caves, steep hills, and sinkholes—throughout the agricultural zone and the more remote (heretofore) permanently forested lands.[145] These various land uses and their geographic scope are illustrated in the TMCC and Alcaldes Association Maps.[146]

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137. *See supra* note 70 and accompanying text.

138. *See* Wilk, *supra* note 65, at 3-8.

139. Professor Nietchman based his report on extensive interviews with Maya individuals throughout Toledo. *See* Nietschmann, *supra* note 67, at 1.

140. *See* HAND DRAWN MAPS OF MAYA VILLAGES IN THE TOLEDO DISTRICT, *appended to* Affidavit of Bernard Nietschmann, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510); MAP OF MAYA LAND USE IN THE TOLEDO DISTRICT SOUTHERN BELIZE; MAYA ATLAS, *supra* note 6, at 18, 43-115.

141. Wilk, *supra* note 65, at 3.

142. *See id.* at 4.

143. Professor Wilk explains that "[t]his agricultural fallow zone may *look* like untouched forest while it is being rested, but it is still used for many purposes, and it may still contain tree crops which are regularly harvested. These fallow areas also attract game animals, and provide many useful economic plants." *Id.*

144. *See id.*

145. *See id.*

146. *See* MAP OF MAYA LAND USE IN THE TOLEDO DISTRICT SOUTHERN BELIZE and HAND DRAWN MAPS OF MAYA VILLAGES IN THE TOLEDO DISTRICT, *appended to* Affidavit of Bernard

¶72 The evidence of traditional land tenure indicates that the Maya hold property rights of an exclusive nature vis-a-vis non-Maya—that is, full aboriginal title, at least to lands within established Maya villages, whether or not they are included in reservations, and to the areas adjacent to the villages identified as agricultural zones in which the dominant human factor traditionally has been Maya.[147] As a general matter, exclusivity or joint exclusivity of land use by indigenous groups establishes title to land.[148] Full aboriginal title also could exist in the forest lands further removed from villages that the Maya traditionally have used for hunting and gathering and where, by virtue of these uses, the Maya have had an exclusive or dominant presence in the lands, and that presence has not been diminished by any legitimate means. At the very least, with respect to the more remote forest lands used for hunting and gathering, the Maya appear to have non-exclusive rights of access to and use of resources commensurate with the customary practices.[149] In all cases in which Maya aboriginal rights exist, whether they be rights to full title or rights of usufruct, the incidence and distribution of the rights among Maya communities and individuals are functions of the relevant Maya customs.[150]

¶73 Some of the lands that the Maya have traditionally used and occupied and to which they accordingly have aboriginal property rights are located within the reservations that were established by the British colonial government for the benefit of the Maya beginning in 1918.[151] Many of the Maya villages of the Toledo District, and substantial parts of the areas traditionally used by the Maya for agriculture, hunting and gathering, or other purposes, however, are outside of the Maya reservations. It appears that virtually all of these areas used by the Maya outside of the reservations are comprised of lands not now titled to any

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Nietschmann, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510); MAYA ATLAS, *supra* note 6, at 18, 43-115.

147. Courts in analogous cases of dominant historical or traditional indigenous use and occupancy of land have found full aboriginal title akin to fee simple. *See, e.g.*, United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116-118 (1938) (stating that the right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee); Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 76 (Austl.) (finding the indigenous Meriam people to be "entitled as against the whole world to possession, occupation, use and enjoyment of the Island of Mer" with certain exceptions).

148. *See* Delgamuukw v. British Columbia [1997] 153 D.L.R. (4th) 193, 258 (Can.).

149. Instructive in this respect are cases that have found free-standing rights to hunt or fish, in the absence of full underlying aboriginal title. *See generally* R. v. Cote (1996), 138 D.L.R. (4th) 385 (upholding indigenous rights to continue fishing practices predating Canadian sovereignty); Adams v. The Queen (1996) 138 D.L.R. (4th) 657 (Can.) (recognizing the right to fish without land title as a means to preserve integrity of aboriginal societies).

150. *See* Wilk, *supra* note 65, at 7-14. Thus, under the relevant custom, Maya aboriginal title over the lands immediately surrounding a Maya village inheres to the particular benefit of that village. Each Maya village has a clearly demarcated territory which Maya custom regards as belonging to the village. *See id.* at 5-6; Nietschmann, *supra* note 67, at 1-13; MAYA ATLAS, *supra* note 6, at 43-115 (1997). Maya aboriginal title over certain other areas, by contrast, while exclusive to the Maya vis-a-vis non-Maya, may be shared by two or more Maya villages that under the relevant custom have jointly used the area. *Cf. Delgamuuku*, 153 D.L.R. (4th) at 258 (discussing exclusivity and joint exclusivity).

151. *See* Wilk, *supra* note 65, at 5-6.

private party.[152] Maya common law property rights thus extend well beyond Maya reservation boundaries as a result, not of any affirmative government grant, but rather of historically-rooted customary usages.[153]

¶74 Moreover, the reports of Professors Wilk and Nietschmann and the maps submitted by the Maya parties in the lawsuit indicate substantial overlap between, on the one hand, the aggregate area of traditional Maya use and occupancy and, on the other, the lands that are subject to the logging concessions that are being challenged by the lawsuit. The second map attached to the Maya parties' initial pleading in *TMCC v. Attorney General of Belize*, attached as Appendix B, illustrates this overlap and shows that the greater part of Maya territory is burdened by the logging concessions. A comparison between this map and the composite map of Maya land use, attached as Appendix A to the pleading, reveals that several of the Maya villages and other areas intensively used by the Maya for agricultural and other purposes, other lands used intensively by them, and parts of the Maya reservations are within logging concessions. Almost all of the lands that have been burdened by the logging concessions are officially designated either Maya reserve or national lands.[154] Notwithstanding this designation, under common law principles as applied to the facts of this case, substantial parts of these logging concession areas are lands over which the Maya hold aboriginal rights, either exclusive ownership rights or nonexclusive rights of access to or use of resources.

V. CONCLUSION

¶75 It is beyond the scope of this Article to delineate precisely the areas over which the Maya hold exclusive ownership rights as opposed to those areas in which the Maya have lesser rights of usufruct, or to identify definitively the outer boundaries of the total land area within which the Maya possess rights. Nor is it the purpose of this Article to specify the extent of legal protection to be accorded these rights. As suggested earlier, Maya aboriginal rights should be held to fall within the protections of Articles 3 and 17 of the Constitution of Belize which generally uphold property rights.[155] An analysis of the scope of these constitutional protections as applied to Maya aboriginal rights is left for another day (and

152. *See* MAP OF MAYA COMMUNAL LANDS, RESERVATIONS, AND LOGGING CONCESSIONS, *appended to* Affidavit of Bernard Nietschmann, TMCC v. Attorney Gen. of Belize [1996] (Belize) (No. 510) (map showing reservation boundaries on Maya traditional lands); MAYA ATLAS, *supra* note 6, at 123. Professor Wilk surmises that "today the reservation boundaries bear little relationship to long-established customary territories around villages. Many villages have no formal reservations, though they have used their territories for more than 50 years with tacit government approval." Wilk, *supra* note 65, at 5.

153. *See supra* notes 89-103 and accompanying text; MAP OF MAYA COMMUNAL LANDS, RESERVATIONS, AND LOGGING CONCESSIONS, *appended to* Affidavit of Bernard Nietschmann, *TMCC* (No. 510); MAYA ATLAS, *supra* note 6, at 123.

154. *See* Affidavit of Richard Belisle at 1-4, *TMCC* (No. 510); Affidavit of Jose A. Cardona at 7, *TMCC* (No. 510).

155. *See supra* notes 32-39 and accompanying text.

preferably to another author with greater expertise in Belize constitutional law). Rather, the objective here has been simply to establish that Maya rights to lands and resources exist over a certain geographic area and these rights render highly questionable, if not invalid, the challenged logging concessions and the activity permitted under them.

¶76 The common law doctrine of aboriginal rights, as appropriately construed in light of relevant international norms, applies in this case with the following result: parts of the concession areas include lands that are subject to full Maya aboriginal title by virtue of intensive Maya use and occupancy patterns, while other parts of the concession areas extend over lands in which the Maya have at least freestanding rights to wildlife and other resources. Whatever the full extent of legal protection to be afforded these property rights, the government cannot simply ignore them as it proceeds with its development plans.

¶77 The government of Belize granted the concessions without consulting the Maya or recognizing Maya land and resource rights within the affected areas. Most of the concessions did not even become public knowledge until after the Inter-American Development Bank became aware of them in the course of considering a loan to finance improvement of the road that connects the Toledo District with the rest of Belize. No specific measures have been adopted to mitigate the adverse impact on Maya subsistence and cultural uses of the lands and resources in the concession areas. In their affidavits, the Maya parties attest that such adverse effects already have begun.[156] In addition, the Belize government has not taken any measures to ensure that the Maya will receive tangible financial benefits from the logging. If indeed Maya aboriginal rights exist in the logging concession areas, as argued here, such neglect is an infringement of those rights.

¶78 In their suit against the government, the Maya are hoping to reverse the infringement. It is perhaps too much to ask that the Supreme Court of Belize accept the argument of aboriginal rights, however well founded, and rule in favor of the Maya in direct confrontation with the highest levels of government over its development initiatives. Local observers who are sympathetic to the Maya express skepticism about the ability of the Belize Supreme Court to take such a stand, because of political factors that are said to influence the Court. Nonetheless, as a functioning judicial body, the Belize Supreme Court should exercise its constitutional judical authority and fully address and decide the Maya claim on the merits of the relevant law and facts. The possibility of an appeal that could reach the British Privy Council[157] could better ensure that the Maya claim will be taken seriously at some point.

¶79 In any case, the Maya are looking for the lawsuit to have a

156. *See* Affidavit of Leonardo Acal at 1-2, *TMCC* (No. 510); Affidavit of Sebastian Choco at 1-2, *TMCC* (No. 510); Affidavit of Santiago Chub at 1-2, *TMCC* (No. 510); *see also* Valdemar Andrade, Orientation Visit to Toledo 1-4 (June 18, 1996) (unpublished manuscript, on file with *Yale Human Rights and Development Law Journal*), *appended to* Affidavit of Araceli Dolores Hunter Krohn, *TMCC* (No. 510) (reporting on an investigation of logging in Toledo).

157. *See supra* note 9 and accompanying text.

catalyzing effect that could prod the government toward addressing Maya interests. Just after filing the lawsuit, the TMCC and the Alcaldes Association submitted a proposal for a negotiated settlement of the dispute.[158] With respect to the area the Maya have identified as their traditional territory, the proposal calls for a suspension and reevaluation of existing logging concessions; a joint management arrangement by which the Maya would participate at the village and regional levels in the management of the forest resources; a guaranteed fifty percent share of the royalties from any logging or other industrial resources extraction; and a priority for Maya individuals and organizations in the issuance of permits and concessions for natural resource development.[159]

¶80 The Maya appear to be aware that the logging controversy, as well as the larger issue of their land rights, are complex matters that are best worked out through negotiated solutions that seek to accommodate the legitimate interests of all concerned. But, typically of indigenous peoples, they are relatively powerless in the political sphere to move the government toward a framework of negotiation based on recognition and understanding of the Maya people and their relationship with ancestral lands and resources. The Maya are now attempting to use the sphere of law and legal process to shift the balance of power and the terms of debate in their favor.

¶81 Indigenous peoples around the world are confronted by similar problems of state-sponsored industrial encroachment onto their ancestral lands, and likewise they are framing and asserting their interests in terms of legal entitlement. Indigenous peoples' use of the law and legal institutions of the very state apparatus that they are challenging is in some respects a curious phenomenon in their centuries-old quest to survive. Whether or not this strategy will prove successful for the Maya of southern Belize is yet to be seen. In principle, they should succeed. The law, and simple justice, are on their side.

158. *See* Proposal from the TMCC and the Toledo Alcades Association to the Government of Belize 1 (Dec. 4, 1996) (on file with the *Yale Human Rights and Development Law Journal*).

159. *See id.*